HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 3305 of 1999

Dethari

Vs.

State of M.P. (now Chhattisgarh)

Criminal Appeal No. 3382 of 1999

Vipin Kumar

Vs.

State of Madhya Pradesh (now Chhattisgarh)

&

Criminal Appeal No. 11 of 2000

Manoj Kumar

Vs.

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT

Post for 08.05.2007

Sd/-
Sunil Kumar Sinha
Judge

(65) APR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 3305 of 1999

APPELLANT Dethari, S/o Bhursabo Behra, aged about 25 years, Occupation Labour, Resident of Village Malda and Maching Centre, Raigarh, Nayapara, Kabir Chowk, Joot Mill Raigarh (C.G.)

Versus

RESPONDENT State of M.P. (now Chhattisgarh) through District Magistrate, Raigarh (C.G.)

Criminal Appeal No. 3382 of 1999

APPELLANT Vipin Kumar S/o Lalkumar Sao, aged about 25 years, Occupation- Cultivation, R/o village Malda, Police Station Pussore, District Raigarh (C.G.)

Versus

RESPONDENT State of Madhya Pradesh (now Chhattisgarh) through District Magistrate, Raigarh (C.G.)

&

Criminal Appeal No. 11 of 2000

APPELLANT Manoj Kumar, Son of Bodhan Sao, Aged about 23 years, Occupation : student, Resident of Village Malda, Police Station Pusour, District- RAIGARH (C.G.)

Versus

RESPONDENT State of Madhya Pradesh (now Chhattisgarh) Through : Station House Officer, Police Station Pusour, District RAIGARH (C.G.)

(Appeals under Section 374 (2) of Cr.P.C.)

Appearance:

Smt. Indira Tripathi, Advocate, for the appellant in Cr.A. No. 3305/99, Shri Abhay Tiwari, Advocate, for the appellant in Cr.A. No. 11/2000 & Shri Rajendra Tripathi, Advocate, for the appellant in Cr.A. No. 3382/99.

Shri S.K. Mishra, Panel Lawyer, for the State in all the Criminal Appeals.

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JUDGMENT
(08.05.2007)

Sunil Kumar Sinha, J,

(1) These appeals are directed against the judgment of conviction and order of sentence dated 1st of December 1999 passed in S.T. No. 119/1998 by the Second Addl. Sessions Judge, Raigarh, whereby the said Court convicted the appellants u/s 376/34 I.P.C. and sentenced them to undergo R.I. for 10 years and to pay a fine of Rs.5000/-, in default of payment of fine to further undergo R.I. for one year.

(2) The brief facts are that the appellants and the prosecutrix namely Motiwati (P.W.5) are residents of village Malda. On 04.2.1998, some Drama show was going on in the village. The show continued till late night. At about 3 a.m., the prosecutrix and her friend namely Ku. Arti were returning to their house after the show was over. Arti's house was first at point on the way, therefore, she went to her house. The allegations are that when the prosecutrix reached in front of the doors of her house and was calling her mother, the appellant Manoj came over there and forcibly dragged the prosecutrix to a nearby open field of one Rajaram. He undressed himself and thereafter, he put off the underwear of the prosecutrix and committed sexual intercourse against her. Further allegations are that when he was committing sexual intercourse, two other appellants, Vipin and Dethari came over there and warned them that the brother-in-law *(Jija)* of the prosecutrix is coming towards them, on

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which, appellant- Manoj and prosecutrix both took another way and the prosecutrix was left by this appellant at her house from the said way. On 05.2.1998, the prosecutrix disclosed the story to her grand mother Parvati (P.W.9) and she also disclosed story to her mother as also father namely Damodar (P.W.4), who narrated the story to *Patel* of the village Sidar Singh. Sidar Singh said that he will ask the accused persons, but when nothing was done, then the prosecutrix alongwith her father Damodar (P.W.4), brother Hemant and brother-in-law (Jija) Shivnath (P.W.7) went to the Police station on 7.2.1998 and a report Ex.P.2 was lodged. The prosecutrix was sent for medical examination where she was examined by Dr. Arti Nande (P.W.13) who also advised for X-Ray for ascertaining the age of the prosecutrix. Dr. M.D. Joshi (P.W.12) has conducted the Ossification test of the prosecutrix and has given his report Ex.P.10, in which she was found to be in between 15 – 16 years. Though a Photostat copy of school certificate was also seized in this case, but the same was not proved on record. On this evidence, the charge sheet was filed and after conclusion of the trial, the accused persons were convicted as aforementioned.

(3) The learned Sessions Judge recorded the finding that the prosecutrix was below 16 years of age on the date of incident and she was subjected to forcible sexual intercourse by appellant Manoj and two other appellants had also assisted him in the manner as they had informed him, during the course of

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sexual intercourse, that brother-in-law *(Jija)* of the prosecutrix is coming towards them.

(4) Learned counsel for the appellant Manoj argued that the prosecution has failed to prove that the prosecutrix was below 16 years of age on the date of incident. He also argued that in the facts and circumstances of the case, the matter appears to be one of consent between the prosecutrix and this appellant. About the other two appellants, learned respective counsel argued that there is absolutely no evidence against them and they have been convicted only on the evidence that they had warned the prosecutrix and Manoj that her brother-in-law (Jija) is coming towards the field where they were performing sexual intercourse.

(5) On the other hand, learned counsel for the State argued that there is ample evidence on record to sustain the conviction and the Sessions Court has rightly convicted the appellants under the aforementioned sections of I.P.C.

(6) I have heard learned counsel for the parties at length and have also perused the records of the Sessions Trial.

(7) So far as the age of prosecutrix is concerned, the father of the prosecutrix namely Damodar (P.W.4) has stated that the prosecutrix was aged about 15 years on the date of incident. In his cross examination in para 11 he had admitted that the date of birth of the prosecutrix was noted by the Kotwar but it is not with him and he cannot tell the actual date of birth of his daughter, but it may in the year 1982. He has also stated that

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at the time of her admission to the School, he had not taken birth certificate from Kotwar. He has further stated that he cannot tell as to what was the age of prosecutrix at the time of her admission to school. The outcome of his evidence is that he is unable to tell her actual date of birth or her age on the date of incident. Another evidence of age is the Ossification test report given by Dr.M.D. Joshi (P.W.12). According to him, the prosecutrix was in between 15 and 16 years on the date of incident. This witness has also admitted in his cross examination that the margin of error in such age, determined by the Ossification test, may be 3 years. Except this, there is no evidence pertaining to the age of the prosecutrix in this case. In Modi's Medical jurisprudence (20th Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be upto three years on either side. Apart from this, a Photostat copy of the School Certificate was produced by the prosecution in which the date of birth of the prosecutrix was recorded as 20.4.1982, but this document was not proved on record. It is important to mention that even the Headmaster of the school was not cited as a witness in the case and was never called by the prosecution to prove the alleged document by comparing the

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same with the original or with the records on which it was issued.

(8) Therefore, in my opinion, the prosecution has utterly failed to prove the age of the prosecutrix below 16 years and the finding recorded by the Court below, on the basis of above evidence, is totally perverse, which deserves to be set aside and I hold it accordingly.

(9) About the forcible sexual intercourse, the prosecutrix namely Ku. Motiwati (P.W.5) has stated that when she reached in front of her house and was calling her mother, appellant Manoj came over there and by closing her mouth he took her to the *Badi* of Rajaram. There, Manoj firstly put off his Pant and thereafter he put off her underwear and committed sexual intercourse against her. She specifically states that while the sexual intercourse was being committed, she had cried, on which the other two appellants namely Vipin and Dethari heard her noise, they came to the place of occurrence and told that her brother in law (Jija) is coming, thereafter, Manoj took her from a different way towards her house and he left her in front of the doors of Kothar of one Dataram. She has further stated that when her mother asked her as to where she had gone ? She told that she will not tell her just now and she will tell her in the morning. However, she has narrated the story to her sister and later on the story was narrated to the mother and father. Admittedly, it was a day when many persons were returning back from the place of Drama Show and they were passing

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through the way. If the prosecutrix was forcibly dragged by the appellant Manoj by closing her mouth, then it should have been noticed by the villagers, particularly by the inmates of those houses which are situated in the close vicinity of the house of prosecutrix. Not a single person could see the appellant dragging the prosecutrix to a long distance from her house to the *Badi* of Rajaram where the sexual intercourse was committed. Another factor which appeals to me is the alleged manner in which the sexual intercourse was committed. The prosecutrix says that after taking her to the said field, firstly, Manoj undressed himself by putting off his full pant and thereafter, he also put off her underwear and then he committed sexual intercourse against her. Can it be possible for a man to do like that without the assistance of the counter-part ? What the girl was doing when the appellant Manoj was undressing himself ? Was it not possible for her to run away immediately when she got a chance because it is not the case of prosecution that either she was threatened or she was caught all the time by the appellant Manoj. These are the circumstances which show the conduct of the prosecutrix and suggest that she has willingly accompanied the appellant and had allowed him to commit sexual intercourse against her.

(10) Apart from this, another important conduct of the prosecutrix is as to why she accompanied Manoj to reach to her house by taking a different way than the way which was easier and on which her brother-in-law was coming. She had full

opportunity to leave the appellant Manoj and to run towards the brother in law. Taking different way to the house by hiding themselves from the brother-in-law is one of the alarming circumstance of the case. All these facts are suggestive that in fact the prosecutrix was a willing party and had gone to the place of occurrence on her own with the appellant Manoj and thereafter they performed sexual intercourse there and when it was warned by the other two appellants that her brother-in-law is coming towards that place, both ran away from the place of occurrence and took a different way to reach the house. The allegations made against the appellant Manoj regarding commission of sexual intercourse is also not supported by the medical evidence as the lady Doctor, who examined the prosecutrix, has not noticed any injury on the person of prosecutrix and her hymen was old ruptured, there were no bleeding points, there was no discharge and according to her, no definite opinion could be given regarding commission of sexual intercourse.

(11) In the facts and circumstances, referred to above, it does not appear to me that a possibility of the prosecutrix being a consenting party can be fully ruled out in this case and the matter appears to be one of consent between the prosecutrix and appellant Manoj.

(12) So far as the other two appellants are concerned, there is absolutely no legal evidence against them and the only evidence which comes against them is that they reached to the spot and

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they told the appellant Manoj that the brother in law of the prosecutrix is coming towards them and on this warning only, the prosecutrix and Manoj left the place of occurrence and they took a different way to reach to the house of prosecutrix so that they may not be caught by the brother in law. On this evidence only, the two other appellants have been convicted by the court below. Such conviction also cannot be sustained for want of legal evidence.

(13) Therefore, the conviction and sentence based upon such evidence against the appellants deserve to be and is accordingly set aside. All the appeals stand allowed. The appellants are acquitted of the charges framed against them.

Sd/-
Sunil Kumar Sinha
Judge

Rao